United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

76-6103

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

JACK SILVERSTEIN,

Plaintiff-Appellant,

-against-

THE UNITED STATES OF AMERICA,
COMMISSIONER OF INTERNAL REVENUE
OF THE UNITED STATES OF AMERICA;
DISTRICT DIRECTOR OF INTERNAL
REVENUE SERVICE, NEW YORK DISTRICT,

Defendants-Appellees.

On Appeal from the United States
District Court for the Southern
District of New York

APPELLANT'S BRIEF AND APPENDIX

SOL FREEDMAN
Attorney for Plaintiff-Appellant
Office and Post Office Address
79 Wall Street
New York, New York 10005
Telephone: (212) 425-5225

ROBERT FISK
United States Attorney,
Southern District of New York
Office and Post Office Address
Foley Square
New York, New York 10007
Telephone: (212) 264-3311

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United States Court of Appeals
for the Second Circuit

JACK SILVERSTEIN,

Plaintiff,

-against-

THE UNITED STATES OF AMERICA, COMMISSIONER of INTERNAL REVENUE of the UNITED STATES OF AMERICA; DISTRICT DIRECTOR of INTERNAL REVENUE SERVICE, NEW YORK DISTRICT,

Defendants.

Circuit Court
Docket No. 76-6103

United States Court
Southern District of
New York

Case No. 75 Civ. 6210

Judge Carter

SOL FREEDMAN
Attorney for Plaintiff-Appellant
79 Wall Street
New York, New York 10005
Tel: (212) 425-5225

TABLE OF CASES

PRELIMINARY STATEMENT

This is an appeal from a judgment of Carter,* U.S.D.J., dismissing plaintiff's complaint for failure to state a claim upon which relief could be granted and for lack of subject matter jurisdiction.

The opinion of District Judge Carter was rendered May 7, 1976. It is not officially reported and is reproduced, in full, in the appendix.

In the complaint plaintiff seeks judicial review of the action of defendants, the INTERNAL REVENUE SERVICE, its COMMISSIONER and DISTRICT DIRECTOR, for the New York District in fixing the amount of the reward payable to him for his services in supplying information which, he alleges, led to the government's recovery of $1,000,000 in additional taxes.

ISSUES PRESENTED

1. Are the actions of defendants, and specifically the COMMISSIONER of the INTERNAL REVENUE SERVICE and its DISTRICT DIRECTOR of its New York District, in determining the amount of the reward payable for furnishing information leading to the recovery of additional taxes subject to judicial review?

2. Does a complaint which alleges that plaintiff, over a period of many years, acting in reliance upon repre-

sentations of defendants' representatives, with respect to the amount of reward payable, performed significant services which led to the recovery of substantial additional taxes by defendants, state a cause of action?

3. If the District Court lacked jurisdiction, should the cause have been transferred to the Court of Claims or the dismissal ordered without prejudice to the institution of an action in that Court?

NATURE OF THE CASE

This is an action for recovery of a reward for furnishing information over many years which led to defendants' collection of $1,000,000 in additional taxes. Plaintiff sought recovery of the amount he claimed had been promised him by defendants' representatives, upon which statements he had relied in continuing to perform these services. Alternatively, he sought review of the reasonableness of the determination of the Internal Revenue officials as to the amount of reward payable.

He received approximately $17,000 in rewards for performing the services which resulted in the recovery of approximately $1,000,000 in taxes by defendants.

PRIOR PROCEEDINGS

The action was commenced by service of a summons and complaint. Prior to answer, defendants moved to dismiss

the complaint for failure to state a cause of action and for lack of subject matter jurisdiction.

The motion was granted and the complaint dismissed.

RELEVANT FACTS

As the allegations of plaintiff's complaint were not controverted and the dismissal was ordered because of legal insufficiency, the facts summarized below are extracted from the complaint.

Plaintiff alleged in the complaint that commencing in 1957 he began furnishing information to defendants representatives pertaining to additional taxes due from certain named individuals and their associates. He asserted that for the 18 year period between 1957 and 1975, he worked in cooperation with defendants' agents on this matter and was advised that he would be compensated by a reward of 10% of any additional taxes recovered. He alleged that he relied upon these representations in continuing to perform the services and that, as a result of his services and based upon the information gathered by him and forwarded to defendants, defendants succeeded in collecting $1,000,000 in additional taxes. As evidence of the unusually broad scope of plaintiff's efforts, plaintiff submitted, as an annex to his Memorandum of Law, a return to a search warrant indicating the government's seizure of various items of evidence gathered

by plaintiff in the cause of his efforts.

The legal basis for plaintiff's claim are discussed in the argument, following.

ARGUMENT SUMMARY

In brief plaintiff urges that Section 7623 of the Internal Revenue Code (26 U.S.C. 7623), which, inter alia, authorizes the Secretary of the Treasury or his delegate to pay rewards to informants such as petitioner, and Regulation Section 301. 7623-1, promulgated by the Internal Revenue Service thereunder, which authorizes each District Director to pay rewards he deems suitable do not vest in either the Secretary or the District Director unfettered and unreviewable discretion to do so. Rather, as recognized by the Court in Saracena v. United States, 75-1 U.S.T.C. p86, 281 (U.S. Court of Claims, No. 216-74 (1/22/75)), in determining the amount so fixed must have rational basis.

It is further plaintiff's contention that on the face of the complaint, there were sufficient allegations to found a determination that an expressed oral agreement existed between plaintiff and defendants which agreement defendants could not repudiate due to plaintiff's performance in reliance upon defendants' agents' representations.

Finally, plaintiff argues that dismissal of the complaint without leave to institute a new action in the Court

of Claims, if it was determined that the action should have been commenced there, was improper.

POINT I

The Actions of the District Director Were Subject to Judicial Review.

26 U.S.C. Sect. 7623 provides:

> "The Secretary or his delegate, under regulations prescribed by the Secretary or his delegate, is authorized to pay such sums, not exceeding in the aggregate the sum appropriated therefor, as he may deem necessary for detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws, or conniving at the same, in cases where such expenses are not otherwise provided by law."

Pursuant to that statute, the Secretary of the Treasury has adopted Regulation Sect.301-7623-1 which provides:

> "All relevant factors, including the value of the information furnished in relation to the facts developed by the investigation of the violation, shall be taken into account by a district director in determining whether a reward shall be paid, and, if so, the amount thereof. The amount of a reward shall represent what the district director deems to be adequate compensation in the particular case, normally not to exceed 10 percent of the additional taxes, penalties, and fines which are recovered as a result of the information. No reward, however, shall be paid with respect to any additional interest that may be collected. Payment of a reward will be made as promptly as the circumstances of the case permit, but generally not until the taxes, penalties, or fines involved have been collected. However, the informant may waive any claim for reward with respect to an uncollected portion of the

> taxes, penalties, or fines involved, in which case the claim may be immediately processed. No person is authorized under these regulations to make any offer, or promise, or otherwise to bind a district director with respect to the payment of any reward or the amount thereof."

In the instant case, the Court below held that it was without jurisdiction to review a determination reached under the above section and regulation with respect to the amount of the reward. If this view is upheld it will create a unique situation; perhaps the only instance of judicially approved non-reviewable administrative action within our jurisprudence. It is submitted that this result is not compelled by the language of the statute or the regulation; not required by the intendment of either and not warranted as a matter of logic. Legislative recognition of the right of one adversely affected by administrative actions is contained in 5 U.S.C. Chapter 7 and specifically Section 702 which provides that:

> "A person suffering legal wrong because of agency action; or adversely affected or aggrieved by agency action within the meaning of a relevant statute is entitled to judicial review thereof."

Whether taken as literally encompassing the instant case or as an indication of legislative intent, this right of judicial review is to be broadly interpreted as creating a presumption that such access is available. (Kingsbrook Jewish Center v. Richardson, 486 F.2d 663 (2nd Cir.); Reddy, Inc. v.

U.S. Dept. of Labor, 492 F.2d 538, reh. den. 495 F.2d 1372 (5th Cir.))

The language of subparagraph (c) of the regulation, in fact, contains support for a contrary result. It states that in determining the amount of any reward to be paid, "All relevant factors***shall be taken into account by a District Director in determining whether a reward shall be paid, and, if so, the amount thereof."

There is no need to cite authority for the proposition that where mandatory language, such as that above quoted is employed, it imposes obligations and whether there has been compliance with such a statutorily imposed obligation is a matter properly within the province of the Courts.

Logically, if there were no legislative intent that the District Director act with rational basis, the above quoted language would be surplusage. If that were intended, all that need have been done was provide that the District Director was empowered to grant rewards in such cases and in such amounts as he deemed fit.

This was recognized by the Court in Saracena v. United States, 75-1 U.S.T.C. 86,281 (Ct. of Claims, 1975). In that case, plaintiffs sued to recover additional rewards based upon their finding, and turning over to the tax authorites, certain funds which were applied to taxes. The Court of Claims stated, in language applicable to the instant case:

"Unfortunately for plaintiffs' contentions, the regulation before us gives the District

of Internal Revenue Service such board discretion that the scope of our review of his decision is very limited. In defining the narrow scope of judicial review in such cases, the Supreme Court stated:

> * * * More than a half-century ago this Court declared that "where Congress has committed to the head of a department certain duties requiring the exercise of judgment and discretion, his action thereon, whether it involve questions of law or fact, will not be reviewed by the courts, unless he has exceeded his authority or this court should be of opinion that his action was clearly wrong." * * * [United States v. Shimer, 367 U.S. 374, 381-82 (1961)]

The rule there announced by the Supreme Court has been followed by many decisions of this court. See, e.g. Odian v. United States, 203 Ct. Cl. 306 (1973); Port Authority of St. Paul v. United States, 193 Ct. Cl. 108, 432 F.2d 455 (1970); Daniels v. United States, 187 Ct. Cl. 38, 407 F.2d 1345 (1969).

Stated another way, to sustain an administrative interpretation of such a broadly written regulation, it is not necessary to find that the agency construction is the only reasonable one or that it is the result the court would have reached had the question arisen in the first instance in judicial proceedings. Udall v. Tallman, 380 U.S. 1, 16 (1965). The judicial function is exhausted when it is found that there is a rational basis for the conclusions of the administrative agency. Mississippi Valley Barge Line Co. v. United States, 292 U.S. 282, 286-87 (1934).

It is clear from the language of the regulation that the District Director has complete discretion in the first instance to

> determine whether an award should be made and, in the second, to fix what, in his judgment, amounts to adequate compensation. There is no statutory or regulatory requirement for a hearing or a well reasoned explanation of the decision. The mere fact that the reward was less than the 10 percent mentioned in the regulation as a possible upper limit does not authorize the court to set aside the award and order a trial to determine adequate or reasonable compensation. Plainly, the amount of the reward was within the range contemplated by the statute and the regulation. The burden is on the plaintiffs to establish that there was no rational basis for the District Director's decision, and they have failed to discharge that burden."

While in that decision the Court held the District Director's actions in fixing the reward with rational basis, and not an abuse of discretion, it also recognized that if the actions were found outside that range, there could be judicial review (and, necessarily judicial annulment) thereof.

If judicial review of the action is available, this Court (or the Court of Claims) had jurisdiction of the subject matter to afford same. Holding the contrary would place the defendants' agents' actions, in this field, in a virtually unique (and surely unwarranted) position. It would treat those who seek compensation under this statute, whether based upon agreements with defendants' agents, as in the instant case, or otherwise, different than those whose claims are based upon other basis.

In holding the District Court without subject matter jurisdiction the Court below relied, primarily, upon

Divonne v. Internal Revenue Service, 75 Civ. 912 (S.D.N.Y. July 14, 1975) and Schein v. United States, 352 F.Supp. 182, 186 (E.D.N.Y. 1972).

Initially, as to the factual distinctions between Scheim and this case, it must be noted, that the plaintiff in Schein did not predicate his claim upon 26 U.S.C. Sect. 7623 or Regulation 301.7623-1 based, apparently, upon quantum meruit. Further there was no claim made that there was any sort of agreement between plaintiff and any representative of defendants that payment would be made for continuing efforts on plaintiff's part in securing information as to unpaid taxes. Plaintiff herein has asserted the existence of such an agreement; his reliance upon the representations to that effect, and his continuing performance of services based thereon. Finally, in Schein the record and decision revealed a determination by the District Director that the plaintiff's efforts and information were not the basis for the collection of the additional taxes but, rather, that the information disclosed was of the normal cause would have become known to the Internal Revenue Service. This is, of course, completely different from the instant case. Here defendants, by the payment of a reward and otherwise, have admitted that plaintiff's efforts led to their recovery of additional taxes. The sole issue as whether the reward was

reasonably proportionate to the taxes under all the circumstances.

The defendant Internal Revenue Service has adopted policies concerning the amount of rewards payable and promulgated them, in an intra-service manual. The following quotation is from Internal Revenue Manual section 4569.12:

> "(1) In accordance with policy statement P-4-86, the Service will allow rewards to informants on the following bases:
>
> (a) For specific and responsible information which caused the investigation and resulted in recovery of taxes, penalties and fines, a reward of 10% of the first $75,000 recovered, 5% of the next $25,000 and 1% of any additional recovery, with a total reward not to exceed $50,000.
>
> (b) For information (not specific) which caused the examination and was of value in determining tax liabilities, and for information which was a direct factor in recovery of taxes, penalties and fines, (although such information did not start the investigation) a reward of 5% of the first $75,000 recovered, 2-1/2% of the next $25,000 and 1/2% of any additional recovery, with a total reward not to exceed $50,000.
>
> (c) For information that caused the investigation but was of no value in determining tax liability; a reward of 1% of the first $75,000 recovered and 1/2% of any additional recovery, with a total reward not to exceed $50,000.
>
> (2) No reward will be paid if the recovery was so small as to call for payment of less than $25,000 under the above formula.
>
> (3) Rewards should be allowed in the

exact amount produced by the applicable percentage calculation.

(4) Two or more of the above bases for determining the reward may be involved in one case if specific and responsible information was given resulting in certain recoveries, but the examining officer determined additional taxes as the result of adjustments not mentioned by the informant, or if the examination led to investigation of related taxpayers. Recoveries from taxpayers related to the taxpayer involved in the claim for reward should be considered in determining the amount of the reward if the examinations led to investigation of the related taxpayers. The basis of reward for recoveries from such related taxpayers would depend upon whether the recoveries were directly or indirectly the result of the informant's information or whether such recoveries were merely incidental to the original examination."

Policy Statement P-4-86, referred to above provides as follows:

"Claims for reward (Form 211) will be paid commensurate with the value of the information furnished voluntarily and upon the informant's own initiative with respect to taxes, fines, and penalties (but not interest) collected. The amount of reward will be determined as follows:

(1) For specific and responsible information which caused the investigation and resulted in the recovery, the reward shall be 10 percent of the first $75,000 recovered, 5 percent of the next $25,000 and 1 percent of any additional recovery, with the total reward not exceeding $50,000.

(2) For information which caused the examination and which was of value in the determination of tax

liabilities, although not specific, and for information which was a direct factor in the recovery, the reward shall be 5 percent of the first $75,000 recovered, 2-1/2 percent of the next $25,000 and 1/2 percent of any additional recovery, with the total reward not exceeding $50,000.

(3) For information that caused the investigation but which was of no value in the determination of the tax liability, the rewards shall be one percent of the first $75,000 recovered and 1/2 percent of any additional recovery, with the total reward not exceeding $50,000.

If the recovery is attributable to information within two or more of the above categories, the respective rates of reward shall be applied--as for example where the examination discloses additional taxes based on adjustments some of which are and some of which are not related to the subject matter of the information supplied, or where the examination proceeds to other taxpayers not indicated by the informant."

If judicial review is held unavailable, defendants will be granted judicial authority to disregard their own procedures with impunity. Plaintiff seeks herein merely an opportunity to prove that in this case there was disregard not only of the statutory intendment but of defendants' own regulations.

POINT II

The Complaint Adequately Alleged a Contractually Based Claim.

The Court below held, as an alternate basis for dismissal, that no jurisdiction over the claims asserted

existed as a matter of contract or quasi-contract. In so holding it relied upon cases in which causes were alleged that Section 7623 or Regulation 301.7623-1, or both contributed an "offer" within the meaning of traditional contract law, which offer ripened into a contract upon the furnishing of information. [See Barker v. Lein, 366 F.2d 757 (1st Cir.); Gordon v. United States, 36 F.Supp. 639 (Ct. Cl.); Chase v. United States, 60 F.Supp. 211 (Ct. Cl.)].

But this is not the basis for plaintiff's claim herein. Here plaintiff has alleged that defendants' representatives stated to him that if he continued working for them and furnishing valuable information, a reward of 10% of the additional taxes recovered would be paid. This is far different from the situation in Gordon where, as the Court stated at page 640 of 36 F.Supp., "There has been no offer to pay any definite sum and, therefore, there has arisen no contract* * *" The distinction between instances in which information was submitted based solely upon the expectation or hope of payment of a reward under the statute and where an agreement existed was recognized by the Court in Saracena, supra. There, at pages 86, 283-86, 284 of 75-1 U.S.T.C., the Court stated "Moreover, there was no express contract to pay plaintiffs' compensation, and it has been held that the regulations here involved* * *do not give rist to an implied contract. (Citing cases)." It is

plaintiff's claim herein that there was an express (albeit oral) agreement; that he performed his portion and defendants breached. This portion of plaintiff's claim, though contractually based, arises under the Internal Revenue Laws and thus the District Courts have jurisdiction thereof without limitation as to amount (28 U.S.C. Sect. 1340) or, if it be so construed up to $10,000 in amount based upon 28 U.S.C. 1346(a)(z).

POINT III

The Cause Should Have Been Dismissed Without Prejudice to Institution of a New Action In The Court of Claims.

Should this Court find that the District Court was without jurisdiction to entertain the case, it nonetheless should reverse so much of the judgment as purports to dismiss the claim on the merits. Once the Court below found itself without jurisdiction, it was improper for it to proceed further and dispose, or purport to dispose, of the case on the merits. In so doing, it was acting on a matter it had held itself to be without jurisdiction to determine. While it can be argued that this portion of the decision below was surplusage and obiter dicta, plaintiff may nonetheless find himself faced with a res judicata argument, predicated upon this portion of the judgment, should an action be instituted in the Court of Claims (See Estevez v. Nabers, 219 F.2d 321, 324)

In the usual case a dismissal for want of jurisdiction

does not preclude a subsequent action in a proper forum. Even a disposition on the merits, in a suit later dismissed for lack of jurisdiction, does not preclude such a new action. (Sacks v. Ohio Nat. Life Ins. Co., 148 F.2d 128, cert. den., 326 U.S. 753; Smith v. McNeal, 109 U.S. 426).

Under the circumstances the Court below could have, and should have, dismissed the action without prejudice to institution of an action based upon the same claim in the Court of Claims.

CONCLUSION

The Judgment of the District Court Should Be Reviewed and Defendants' Motion to Dismiss The Complaint Denied.

Dated: New York, New York
September 16, 1976

SOL FREEDMAN
Attorney for Plaintiff-Appellant
79 Wall Street
New York, New York 10005
(212) 425-5225

DOCKET ENTRIES

United States Court of Appeals
for the Second Circuit

JACK SILVERSTEIN,

Plaintiff,

-against-

THE UNITED STATES OF AMERICA, COMMISSIONER of INTERNAL REVENUE of the UNITED STATES OF AMERICA: DISTRICT DIRECTOR of INTERNAL REVENUE SERVICE, NEW YORK DISTRICT,

Defendants.

Circuit Court
Docket No. 76-6103

United States Court
Southern District of
New York

Case No. 75 Civ. 621(

Judge Carter

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JACK SILVERSTEIN,

Plaintiff,

- against -

THE UNITED STATES OF AMERICA;
COMMISSIONER OF INTERNAL REVENUE
OF THE UNITED STATES OF AMERICA;
and DISTRICT DIRECTOR OF INTERNAL
REVENUE SERVICE, NEW YORK DISTRICT,

Defendants.

----------x

COMPLAINT

Civil Action #

JACK SILVERSTEIN, by his attorney, SOL FREEDMAN, for his complaint herein, alleges upon information and belief as follows:

JURISDICTION:

1. This is a civil action brought by plaintiff, JACK SILVERSTEIN, to recover the fee due him under Rules and Regulations promulgated by the defendants, THE COMMISSIONER OF INTERNAL REVENUE and DISTRICT DIRECTOR OF INTERNAL REVENUE, pursuant to authority granted under the Internal Revenue Code, 26 U.S.C. 7623 pertaining to rewards payable for information relating to violations of the Internal Revenue Laws.

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. 1346.

3. Plaintiff, JACK SILVERSTEIN, is an individual and resident of the City, County and State of New York, and was a resident thereof at all times hereinafter mentioned.

4. Defendants are THE UNITED STATES OF AMERICA; and agencies and heads of agencies of THE UNITED STATES OF AMERICA.

PRELIMINARY STATEMENT OF FACTS:

5. Commencing on or before May 1, 1957 plaintiff furnished information to agents of the defendants pertaining to additional income and other taxes due from the following individuals: SAM SHAPOLSKY; HARRY SHAPOLSKY; MARTIN SHAPOLSKY; LOUIS SHAPOLSKY; and from various businesses, corporations and partnerships owned or controlled by the aforesaid individuals.

6. During the aforesaid period, plaintiff also furnished information to agents of defendants pertaining to additional taxes payable by other individuals affiliated in business with the parties named in the preceding paragraph.

7. Between May 1, 1957 and July, 1975, plaintiff

worked in cooperation with the agents of defendants in obtaining and divulging to them information pertaining to the additional taxes hereinabove referred to.

8. From time to time during the period between May 1, 1957 to July, 1975, plaintiff was awarded rewards in connection with certain of the above matters; said awards varying in amount.

9. Despite plaintiff's written request therefor defendants and their agents failed to reveal to plaintiff the basis for the rewards allowed, but during discussions with various agents of defendants during this period of time, plaintiff was advised that in accordance with procedures followed by defendants in such matters, he would be compensated by the payment to him of an amount equivalent to ten (10%) percent of the additional tax recovered by defendants by virtue of the information furnished defendants by plaintiff, and the work, efforts, labor and services performed by plaintiff in connection with said matters.

10. In furnishing defendants the information and performing the services required to enable defendants to collect the additional taxes, plaintiff relied upon the representations of defendants' agents concerning the amount of the compensation that would be payable to him.

11. Upon information and belief, based upon the information furnished by plaintiff and plaintiff's efforts, work, labor and services performed in connection therewith, as hereinabove set forth, defendants succeeded in collecting approximately $1,000,000.00 in additional taxes in 1974 and 1975 from the parties hereinabove named.

12. Upon information and belief, by virtue of other information given defendants by plaintiff, an additional $12,000,000.00 in taxes was recovered from other persons, entities, corporations and firms associated with and controlled by the above named defendants.

13. At no time herein mentioned was plaintiff an employee or agent of the UNITED STATES OF AMERICA or any agency thereof.

14. Plaintiff received as compensation for his services, and in payment of the reward allowable, $17,000.00 or approximately 1.7% of the taxes collected by defendant.

15. On account of the foregoing, defendants are indebted and liable to plaintiff for an amount which is presently in the sole knowledge and information of defendants.

16. Demand has been made upon defendants for payment of said indebtedness, but said defendants rejected said demand by letter dated July 11, 1975.

WHEREFORE, plaintiff, JACK SILVERSTEIN, by his undersigned attorney, demands judgment directing defendants to account to him for all additional taxes collected by defendants from the individuals above named and awarding judgment to plaintiff in the amount of ten (10%) percent of such additional taxes, together with interest and plaintiff's costs and disbursements in this action, and for such other and further relief as to which plaintiff may be entitled.

Dated: New York, New York
September , 1975.

SOL FREEDMAN
Attorney for Plaintiff
79 Wall Street
New York, New York 10005
(212) 425-5225

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JACK SILVERSTEIN,

Plaintiff,

-against-

UNITED STATES OF AMERICA, et al.,

Defendants.

NOTICE OF MOTION TO DISMISS THE COMPLAINT

75 Civ. 6210 (RLC)

S I R S :

PLEASE TAKE NOTICE that defendants will move this Court pursuant to Rule 12(b) of the Federal Rules of Civil Procedure in Room 2903 on March 19, 1976 in the United States Courthouse, Foley Square, New York, New York at 10:00 o'clock in the forenoon for an order dismissing the complaint herein on the grounds that the complaint fails to state any claim upon which relief can be granted or any claim over which the Court has jurisdiction or for such other relief as is proper.

PLEASE TAKE FURTHER NOTICE that answering papers, if any, must be served on the undersigned at least six (6) days before the return date of this motion, or, if served personally, three (3) days before the return date of this motion.

Dated: New York, New York
February 27, 1976.

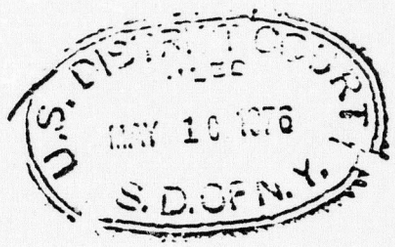
Yours, etc.,

THOMAS J. CAHILL
United States Attorney for the
Southern District of New York
Attorney for Defendants

By: _____
NATHANIEL L. GERBER
Assistant United States Attorney
Office & P.O. Address:
United States Courthouse Annex
One St. Andrew's Plaza
New York, New York 10007
Telephone (212) 791-1946

TO: SOL FREEDMAN, ESQ.
79 Wall Street
New York, New York 10005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



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JACK SILVERSTEIN, :

Plaintiff, :

- against - : 75 Civ. 6210

UNITED STATES OF AMERICA, et al., :

Defendants. : #44373

- x

A P P E A R A N C E S:

Sol Freedman, Esq.
79 Wall Street
New York, New York 10005
Attorney for Plaintiff

Honorable Thomas J. Cahill
United States Attorney for the
Southern District of New York
One St. Andrew's Plaza
New York, New York 10007
by Nathaniel L. Gerber, Esq.
Assistant United States Attorney
Attorneys for Defendants

CARTER, District Judge

O P I N I O N

Defendant has moved, pursuant to Rules 12(b)(6) and 12(b)(1), F.R.Civ.P., for an order dismissing plaintiff's complaint for failure to state a claim upon which relief can be granted and for lack of subject-matter jurisdiction. The motion is granted.

Facts

Plaintiff seeks to recover a reward from the United States Internal Revenue Service ("IRS") for supplying information which allegedly led to the collection of additional taxes in the amount of one million dollars from Sam Shapolsky, Harry Shapolsky, Martin Shapolsky, and Louis Shapolsky. Plaintiff concedes that he has already received a reward of seventeen thousand dollars but contends that based upon unidentified assurances given by defendants upon which he relied in furnishing information, he is entitled to a total reward in the amount of ten percent (10%) of the additional taxes recovered, or one hundred thousand dollars.

Discussion

It is clear that this court lacks subject-matter jurisdiction over this controversy. Plaintiff predicates jurisdiction upon 28 U.S.C. §1346 but fails to indicate upon which specific section of

that statute he relies. No portion of §1346 however--or any other statute for that matter--is a proper jurisdictional predicate.

Since Section 7623 of the Internal Revenue Code [1] which authorizes payment of a reward to an informant, does not give rise to an implied contract, 28 U.S.C. §§1340 and 1346(a)(2) do not provide a basis for subject matter jurisdiction. See Divonne v. Internal Revenue Service, 75 Civ. 912 (S.D.N.Y., July 14, 1975); Schein v. United States, 352 F. Supp. 182, 186 (E.D.N.Y. 1972). [2]

---

[1] 26 U.S.C. §7623 provides as follows:

> "The Secretary or his delegate, under regulations prescribed by the Secretary or his delegate, is authorized to pay such sums, not exceeding in the aggregate the sum appropriated therefor, as he may deem necessary for detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws, or conniving at the same, in cases where such expenses are not otherwise provided by law."

Pursuant to §7623, the IRS has adopted Regulation §301.7623-1, which authorizes each district director to pay such rewards as "he deems suitable."

[2] Plaintiff Silverstein's claim for $100,000 also exceeds the $10,000 jurisdictional maximum of 28 U.S.C. §1346(a)(2).

Furthermore, a line of authorities have dismissed complaints based on alleged implied contracts for failure to state a claim on which relief can be granted. Barker v. Lein, 366 F. 2d 757, 758 (1st Cir. 1966); Gordon v. United States, 92 Ct. Cl. 499, 36 F. Supp. 639 (1941); Katzberg v. United States, 93 Ct. Cl. 281, 36 F. Supp. 1023 (1941); Chase v. United States, 103 Ct. Cl. 780, 60 F. Supp. 211 (1945). In each of these cases, the court held that the provision of Regulation §301.7623-1 or its predecessor authorizing the district director to award such sums "as he deems suitable" did not constitute an offer of any definite or ascertainable sum. Therefore, these courts have held, no contract arose from the provision for reward. I concur in this view and hold that the complaint fails to state a claim for breach of implied contract on which relief can be granted. See Divonne v. Internal Revenue Service, supra.

Nor is there jurisdiction pursuant to the Federal Tort Claims Act, 28 U.S.C. §2671 et seq., and the corresponding jurisdictional statute, 28 U.S.C. §1346(b). See Divonne v. Internal Revenue Service, supra.

Finally, jurisdiction is lacking under the mandamus provision of the Judicial Code, 28 U.S.C. §1361, and under the Administrative Procedure Act, 5 U.S.C. §701 et seq. See Divonne v. Internal Revenue Service, supra, and cases cited therein.

Accordingly, the complaint is dismissed for failure to state a claim in implied contract and for lack of subject matter jurisdiction.

SO ORDERED.

Dated: New York, New York
May 7, 1976

Robert L. Carter
ROBERT L. CARTER
U.S.D.J.

UNITED STATES DISTRICT COURT:
SOUTHERN DISTRICT OF NEW YORK

----------x

JACK SILVERSTEIN,

Plaintiff,

- against -

UNITED STATES OF AMERICA, et al.,

Defendants.

----------x

NOTICE OF APPEAL

File No. 75Civ.6210
(RLC)

NOTICE IS HEREBY GIVEN, that JACK SILVERSTEIN, plaintiff, above named, hereby appeals to the United States Court of Appeals for the Second Circuit, from the Order of the United States District Court for the Southern District of New York, dated May 7, 1976, and filed May 10, 1976, dismissing the complaint for failure to state a claim, and for lack of subject matter jurisdiction.

Dated: New York, New York
June 7, 1976.

SOL FREEDMAN
Attorney for Plaintiff
79 Wall Street
New York, New York 10005
(212) 425-5225

To: Robert Fiske, Esq.
U.S. Atty, So. Dist. of N.Y.
Foley Square
New York, N.Y.

SERVICE OF 2 COPIES OF THE WITHIN

Brief & Appendix

IS HEREBY ADMITTED.

COPY RECEIVED
SEP 20 1976
ROBERT B. FISKE JR.
U.S. ATTORNEY
SO. DIST. OF N.Y.

DATED:

Attorney for